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SUBJECT: The Use of Blanket Purchase Agreements and "Mini-Competitions" Under General Services Administration Federal Supply Schedule Contracts

Blanket Purchase Agreements (BPAs) have long been useful for certain small purchases or simplified acquisitions. In recent years, they have become more popular for a specialized use, as adjuncts to General Services Administration Federal Supply Schedule (GSA FSS, or Schedule) contracts to obtain more favorable prices or other benefits for the BPA-issuing agency and designated users. Such BPAs are issued under FAR 8.404(b)(4) and 13.303-2(c)(3), and under provisions contained in the underlying Schedule contracts, rather than the general rules for BPAs (FAR 13.303-1, et seq.).

A normal BPA is not a complete contract in itself until an order is issued under it; until then, it is no more than a "charge account" (FAR 13.303-1(a)). As for those BPAs issued under Schedule contracts, they do not stand entirely on their own as separate and distinct contracts even when orders are issued. Additionally, they are not subject to the relatively low purchase limitations that apply to normal BPAs (FAR 13.303-5(b)(1)). Despite that, the issuance of these BPAs and orders under them are not subject to normal competition requirements; because the underlying Schedule contract was competitively awarded, they are presumed to be issued pursuant to full and open competition, like any order against a Schedule contract. Such BPAs may not, however, be "inconsistent with the terms of the applicable schedule contract" (FAR 13.303-2(c)(3)) and are supposed to address "the frequency of ordering and invoicing, discounts, and delivery locations and times" (FAR 8.404(b)(4)). As such, these BPAs are adjuncts to the underlying GSA FSS contracts, whose purpose is to meet specialized requirements of the users issuing them.

At FAR 8.404(b)(3) and (5), ordering offices are urged to seek price reductions for orders over the maximum order threshold. In their drive for lower prices and other benefits, agencies have introduced a form of competition into the process of issuing orders or BPAs under GSA FSS contracts. That is to say, they may invite Schedule contract holders to compete for issuance of an order, or for issuance of one or more BPAs under their contracts, or even for issuance of an order under previously issued BPAs, in response to a Request for Quotations (RFQ), usually on SF 1449 or other appropriate form.

These competitions, and issuance of requests for quotations, are not required by the FAR. It should be noted, however, that GSA has issued special ordering procedures under FAR 8.402 for two categories of Schedule 70 information technology (IT) services which are based on hourly rates. These are IT professional services under Special Item No. (SIN) 132-51, and Electronic Commerce (EC) services under SIN 132-52. The special procedures do require use of RFQs, among other things, to support the issuance of orders. The stated rationale is that, although the

Schedule labor rates are fair and reasonable, "the ordering office . . . is responsible for considering the level of effort and mix of labor proposed to perform a specific task being ordered and for making a determination that the total firm-fixed price or ceiling price is fair and reasonable." GSA Revised Terms and Conditions for IT Professional Services (SIN 132-51) and EC Services (SIN 132-52), para. 2a(2).) No such procedures have been promulgated for any other category of IT services, or for IT equipment or supplies. Nevertheless, the published procedures are of interest for the framework they provide for general implementation of the loose guidance at FAR 8.404.

Other than as stated above, what standards govern the Government's conduct of such "mini-competitions"? The FAR provides only limited guidance. The provisions under FAR 13.303 give a clear picture of what a BPA should look like, but BPAs under Schedule contracts are mentioned only in passing (FAR 13.303-2(c)(3)), and the purchasing instructions at FAR 13.303-5 are largely irrelevant to these BPAs. The potentially useful guidance at FAR 16.505(b) concerning issuance of orders under multiple-award Indefinite Delivery/Indefinite Quantity (IDIQ) contracts is inapplicable (FAR 16.500). FAR Part 38 on Schedule contracting is silent. Only FAR 8.404 even hints at the possibility of competition in its ordering procedures for optional use schedules. The GSA's special ordering procedures apply only to certain services. With the dearth of regulatory guidance, the General Accounting Office (GAO), through its decisions, has provided some information on how to conduct mini-competitions in connection with BPAs and orders under Schedule contracts.

What has the GAO told us? In case after case, the GAO has pointed out that agencies are not required to conduct competitions for purchases carried out in connection with GSA FSS contracts, but that, if they elect to do so, the GAO will review the agency's actions to make sure they were fair and reasonable, and consistent with the solicitation (e.g., Haworth, Inc., B-256702.2, Sept. 9, 1994, 94-2 CPD para. 98; Amdahl Corp., B-281255, Dec. 28, 1998, 98-2 CPD para. 161). Competition is the key; no distinction is made between orders or BPAs issued under Schedule contracts, or orders issued under BPAs.

If the agency discovers that its RFQ or Request for Proposals (RFP) does not accurately set forth its actual minimum needs, the agency must amend the solicitation and communicate the change to all participating vendors and give them a chance to bid anew. (Lanier Business Products, Inc. B-203977, Feb. 23, 1982, 82-1 CPD para. 159; New Brunswick Scientific Co., Inc., B-246291, Feb. 3, 1992, 92-1 CPD para. 141.)

Fair treatment is imperative. Once it commences a mini-competition, an agency cannot take shortcuts, such as amendment or waiver of its requirements for only one of the vendors without communication to the others. (Haworth, Inc., op. cit.; Dictaphone Corp., B-254920.2, Feb. 7, 1994, 94-1 CPD para. 75; SMS Data Products Group, Inc., B-280970.4, Jan. 29, 1999, 99-1 CPD para. 26.) (Id.)

The waiver or change of requirements can have implications for contract scope. In the 1997 case of Marvin J. Perry & Associates, B-277684, Nov. 4, 1997, 97-2 CPD para. 128, the Navy issued a RFQ to several holders of GSA FSS contracts for bedroom furniture. The RFQ specified that the furniture be made of red oak. The Navy issued an order to the low price vendor, which made delivery. Subsequently, the vendor advised that its supplier had mistakenly delivered ash furniture, which was cheaper than red oak. The Navy decided to accept the ash furniture when the vendor showed that it could stain it to look like red oak. The protestor stated that if it had known that the Navy would accept ash, it could have submitted a much lower quote. The GAO determined that the substitution was a material change, and beyond the scope of the order, primarily because of the significant difference in cost, and because the vendors could not reasonably have anticipated the change. "[T]he Navy was obligated to ensure that the competition was conducted fairly; the fact that a requirement is fulfilled through the FSS does not exempt an agency from treating vendors consistent with the concern for a fair and equitable competition that is inherent in any procurement." (Id., pp. 4-5.) In this case, the Navy should have given the competing vendors an opportunity to submit quotes on ash furniture.

An agency must recognize when clarification of a proposal is needed, and must seek it. In SMS Systems Maintenance Service, Inc., B-270816, April 29, 1996, 96-1 CPD para. 212, the GAO upheld a protest against a GSA Schedule order for computer equipment maintenance services by the Department of the Treasury because of unequal treatment of the vendors. The agency received two proposals. Both were unclear on significant points, but the agency sought clarification from only one, DEC, which happened to be the second low bidder. Moreover, DEC's clarification revealed that it was not planning to meet the agency's requirements as written. The agency issued an order to DEC. Upholding the protest, the GAO concluded, similar to Haworth, op. cit., that the agency improperly relaxed the requirement for DEC, and that fairness required that SMS be given an opportunity to clarify its proposal, and also to quote on terms similar to those provided by DEC. By implication, alternatively, the agency should have affirmatively asked SMS for clarification; on the facts, apparently that vendor could easily have satisfied the agency's concerns.

If an agency asks vendors to go to the trouble of preparing competitive quotes to meet a special requirement, it must say something about the basis for award and the evaluation criteria. In COMARK Federal Systems, B-278343, Jan. 20, 1998, 98-1 CPD para. 34, the Comptroller General sustained a protest against an acquisition of the Department of Health and Human Services for failure to do this. In 1997, the agency issued BPAs for various kinds of Automatic Data Processing (ADP) products and services, to several Schedule contractors. Subsequently, the agency issued to the BPA holders a RFQ for a delivery order for desktop workstations. The RFQ set forth no evaluation criteria. Eventually the agency accepted a non-low quote from one BPA holder and issued the order. COMARK protested "that the RFQ was silent as to what evaluation criteria the agency would follow", and that it thought the agency wanted only "the low, technically acceptable quote." Instead, according to the protestor, the agency "improperly engaged in a 'best value' procurement." The GAO agreed, saying that, if an agency plans to conduct something beyond a simple Schedule purchase, and issues solicitations asking, for

example, that vendors select a configuration of items to meet the agency's specified requirements, the agency must provide some guidance about the selection criteria, "to provide for a fair and equitable competition." While the agency "need not identify detailed evaluation criteria", it must at least indicate the basis on which selection is to be made, in this case either low-cost technically acceptable, or best value with a cost/technical tradeoff.

BPAs must be issued in accordance with both FAR 8.404 and 13.303. The case of Boehringer Mannheim Corp., B-279238, May 21, 1998, 98-1 CPD para. 141, concerned a purchase of blood glucose monitoring products by the Department of Veterans Affairs. The agency conducted a competition among holders of GSA FSS contracts and issued a BPA to the winning vendor. The protestor complained about the alleged improper bundling of different products. Reviewing the facts, the GAO disagreed. Beyond that, two points are worth noting. In denying the protest, the GAO reviewed the agency's actions in light of FAR 8.404 and 13.303 and concluded that the agency "executed the . . . BPA in accordance with the FAR." Furthermore, the GAO observed, "A BPA is not a contract," but rather, as described at FAR 13.303-1(a), a simplified method of filling anticipated repetitive needs by establishing "charge accounts" with qualified sources.

The GAO's decision in the case of Information Systems Technology Corp., B-280013.2, Aug. 6, 1998, 98-2 CPD para. 36, indicates that a protester's challenge to a mini-competition will fail unless it can show prejudice. Here the GAO considered an acquisition of Independent Validation and Verification (IV&V) and system testing support services by the Department of Health and Human Services. The agency held a competition among holders of GSA FSS contracts for issuance of several BPAs, to be based on one factor, technical, with subfactors. Vendors were required to submit technical proposals for the BPAs. At their option, vendors could also propose separately on up to four task orders. According to the evaluation criteria in the solicitation, everything would be evaluated, but issuance of BPAs would be based only on technical proposals. Cost/price was not a factor for the BPAs, but would be a consideration later for issuance of the task orders. The protestor was not issued a BPA because the agency felt that its technical proposal did not contain enough detail to show that it understood the requirement. The firm argued that the agency should have considered its task order proposals in conjunction with its technical proposal, to obtain the desired information. Moreover, the protestor believed that the evaluations of the technical proposal and the task orders would be combined, because the invitation letter did not make clear to it that they would remain separate. The GAO agreed that the letter was unclear, but found that this did not prejudice the protestor. Not only did the protestor receive the lowest score on its technical proposal, but it also earned low scores on its task order proposals, again because of lack of detail. The task order scores would not have materially improved the protestor's technical score. (The GAO evinced no concern that cost or price was not a factor, presumably because prices already were available in the underlying GSA FSS contracts, and users would have several BPA holders from among whom to choose for performance of their task orders.)

Discussions with quoters must be meaningful. In sustaining the protest of ACS Government Solutions Group, Inc., B-282098, June 2, 1999, the Comptroller General found that the

Department of Housing and Urban Development had made a number of errors in an acquisition of comprehensive servicing for single-family home mortgages. The agency conducted a competition for issuance of a task order under the winning quoter's GSA FSS contract. The GAO found that the evaluation was flawed in several respects. The winning quote did not meet certain requirements concerning use of software; in effect, the agency changed or relaxed its requirements, but did not amend the RFP or otherwise notify all the offerors of the change. Further, under the past performance factor, the winner was in effect given double credit for certain experience. Finally, records of the evaluation showed that the agency was concerned about an unexplained increase in the protestor's prices from the base year to the outyears. However, the protestor apparently was not asked for an explanation. The GAO admitted that it was unsure whether this lack of discussion had any impact on the selection decision, but nevertheless felt that the agency was at fault for not discussing its concern with the protestor. Apparently treating this competition under Schedule contracts the same as if the agency had issued a RFP under FAR Part 15, the GAO stated, "The statutory and regulatory requirement for discussions with all competitive range offerors . . . means that such discussions must be meaningful, equitable, and not misleading. . . Discussions cannot be meaningful unless they lead an offeror into those weaknesses, excesses or deficiencies of its proposal that must be addressed in order for it to have a reasonable chance of being selected for award." The GAO cited FAR 15.306(d)(1) and Du and Associates, Inc., B-280283.3, Dec. 22, 1998, 98-2 CPD para. 156, among other authorities.

What conclusion can we draw from the above decisions? If an agency conducts a competition for issuance of Schedule orders, BPAs under Schedule contracts, or orders under such BPAs, in which vendors are required to propose something, such as lower prices, other than what is set forth in their Schedule contracts, the GAO will examine the competition to determine whether it was conducted in a fair and reasonable manner, and consistently with the solicitation. Except when proceeding under the GSA's special ordering procedures for certain services, an agency does not have to conduct a competition, or do anything more than what is required by FAR 8.404. If a BPA is issued, some of the guidance at FAR 13.303 will apply. Beyond that, the more an agency chooses to use procedures like those required for full and open competition, the more likely that the agency may be deemed bound to follow the applicable guidance in other parts of the FAR.

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